STATE OF MICHIGAN

COURT OF APPEALS

BRITANY ENCARNACION, Personal Representative of the ESTATE OF CHACE ENCARNACION,

Plaintiff-Appellee,

v

ASCENSION ST. JOHN HOSPITAL, formerly known as ST. JOHN HOSPITAL AND MEDICAL CENTER, and NATALIE KONTOS, DO,

Defendants-Appellants.

UNPUBLISHED
March 23, 2023

No. 358908
Wayne Circuit Court
LC No. 19-008119-NH

Before: RICK, P.J., and SHAPIRO and LETICA, JJ.

PER CURIAM.

In this medical malpractice, wrongful-death action, defendants Ascension St. John Hospital, formerly known as St. John Hospital and Medical Center, and Natalie Kontos, D.O., appeal by leave granted the trial court's orders denying their motion for summary disposition of plaintiff's claims for lost future earnings and lost household services under MCR 2.116(C)(8) (failure to state a claim for relief) and (C)(10) (no genuine issue of material fact), and denying their motion in limine to preclude the testimony of plaintiff's economist expert, Ronald Smolarski, as unreliable. We reverse the trial court's order denying summary disposition with respect to plaintiff's claims for lost future earnings and lost household services, and accordingly, we decline to consider the trial court's decision on defendants' motion in limine because the issue is moot.

I. BACKGROUND

The decedent child was born at defendant hospital on June 12, 2014. He allegedly had visible vesicles (fluid-filled sacs or blisters) on his skin. Plaintiff alleges that defendants should have recognized that the vesicles were signs of disseminated herpes simplex virus infection. After the child was discharged from the hospital shortly after birth, plaintiff returned to the hospital with the child on June 15, 2014. At that time, the child was diagnosed with disseminated herpes and

transferred to Children's Hospital of Michigan. Unfortunately, treatment was unsuccessful and he died on June 28, 2014.

Plaintiff brought this action against defendants for medical malpractice under the wrongful-death act, MCL 600.2922. Plaintiff's claims for economic damages included loss of the decedent's future earnings and loss of household services he would have provided to plaintiff. Plaintiff retained Ronald T. Smolarski as an expert in the field of economics. Smolarski calculated the value of decedent's expected future earnings and future services. Defendants moved for summary disposition of these claims under MCR 2.116(C)(8) and (10). They argued that the wrongful-death act does not permit the decedent's heirs to recover more than the portion of lost future earnings that would have been contributed to the heirs for support. Defendants also argued that any estimates of an infant decedent's future earnings and future services were impermissibly speculative. Alternatively, defendants moved in limine to exclude Smolarski's testimony under MRE 702 and MCL 600.2955 because it did not satisfy the threshold requirement of reliability.

Defendants argued that the Supreme Court's decision in *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1948), was controlling regarding an estate's ability to recover a decedent's lost future earnings. Plaintiff responded that the controlling authority was *Denney v Kent Co Rd Comm*, 317 Mich App 727; 896 NW2d 808 (2016), in which this Court held that a decedent's estate could recover the same damages that the decedent could have recovered if he survived, including lost future earnings. Defendants responded that *Denney* was incorrectly decided because it conflicted with the Supreme Court's decision in *Baker*. The trial court denied defendants' motion for summary disposition and motion in limine. This Court granted defendants' interlocutory application for leave to appeal.

II. DISCUSSION

A. RECOVERY OF DAMAGES FOR THE DECEDENT'S LOST FUTURE EARNINGS

Defendants first argue that the wrongful-death act does not provide for recovery of lost earnings in excess of the financial support the decedent would have contributed to the heirs. We disagree. However, we agree with defendants' alternative argument that the plaintiff is this case is not permitted to recover such damages because the decedent's future earnings are impermissibly speculative. [1]

[1] "We review de novo a trial court's decision to grant or deny a motion for summary disposition." *Sherman v City of St Joseph*, 332 Mich App 626, 632; 957 NW2d 838 (2020). Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Defendants' motion under MCR 2.116(C)(8) is based on their contention that loss of a decedent's future earnings and household services is not recoverable, as a matter of law, under MCL 600.2922. For the reasons discussed in this opinion, we disagree. However, we agree with defendants' alternative argument under MCR 2.116(C)(10) that such damages are not recoverable in this case because they are speculative.

"A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 474-

In an action for medical malpractice, an injured party may recover damages for future economic losses. MCL 600.1483(2); *Taylor v Kent Radiology*, 286 Mich App 490, 519; 780 NW2d 900 (2009). "Although economic losses are not defined under MCL 600.1483 or MCL 600.6305, this Court has turned to the definition provided in MCL 600.2945(c) in order to determine whether a claim for damages in a medical malpractice action should be characterized as economic or noneconomic losses." *Taylor*, 286 Mich App at 519. Under MCL 600.2945(c), economic losses are defined as "objectively verifiable pecuniary damages arising from . . . loss of wages, loss of future earnings . . . or other objectively verifiable monetary losses."

MCL 600.2921 provides that "[a]ll actions and claims survive death[,]" but that "[a]ctions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to [the wrongful-death statute, MCL 600.2922]." The wrongful-death statute provides that the personal representative of the estate of the deceased may bring an action against the defendant that the decedent would have been entitled to bring if death had not ensued. MCL 600.2922(1) and (2). The decedent's parents are within the class of persons entitled to damages under the wrongful-death statute. MCL 600.2922(3)(a). Most relevant to this appeal, MCL 600.2922(6) provides:

> (6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. [MCL 600.2922.]

In *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 89; 746 NW2d 847 (2008), the Supreme Court noted that MCL 600.2922(1) made liability "contingent on whether the party injured would have been entitled to maintain and recover damages if death had not ensued." *Id*. at 88. The Court further stated that the "wrongful-death act is essentially a 'filter' through which the underlying claim may proceed." *Id*.

In *Denney*, 317 Mich App 727, this Court held that damages for lost earnings can be recovered if the decedent could have recovered those damages in their own lawsuit had they survived. *Id*. at 731-735. This Court noted that lost earnings are not specifically listed in MCL 600.2922(6), but concluded that use of the word "including" in this statute indicates " 'an intent by the Legislature to permit the award of any type of damages, economic and noneconomic, deemed justified by the facts of the particular case.' " *Id*. at 731, quoting *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 651; 761 NW2d 414 (2008). Accordingly, the wrongful-death

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475; 776 NW2d 398 (2009). This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Patrick v Turkelson*, 322 Mich App 595, 605, 913 NW2d 369 (2018) (quotation marks and citation omitted). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. (quotation marks and citation omitted).

statute "neither limits nor precludes the type of damages that could have been recovered by the person had the person survived the injury." *Denney*, 317 Mich App at 731 (quotation marks and citation omitted). Economic damages include " 'damages incurred due to the loss of the ability to work and earn money . . .'[;] [t]herefore, damages for lost earnings are allowed under the wrongful-death statute." *Id*. at 732, quoting *Hannay v Dep't of Transp*, 497 Mich 45, 67; 860 NW2d 67 (2014). This Court also clarified that "a claim for lost financial support under the wrongful-death statute is not the same as a claim for lost earnings. Specifically, lost earnings are damages that the decedent could have sought on his own behalf had he lived, whereas damages for lost financial support would be sought by one who depended on the decedent for financial support." *Denney*, 317 Mich App at 737.

Defendants argue that *Denney* is inconsistent with the Supreme Court's decision in *Baker*, 319 Mich 703, which, in interpreting an earlier version of the wrongful-death act, 1940 CL Supp 14061 *et seq*.; 1939 PA 297, held that an estate could seek damages for lost support only where it was shown that the decedent had a legal duty to contribute to the support of others. *Baker*, 319 Mich at 712. Since the filing of the parties' briefs, however, a panel of this Court has decided this exact issue and concluded that *Denney* is the controlling authority because *Baker* was implicitly overruled by the Supreme Court and superseded by amendments of the wrongful-death act. In *Zehel v Nugent*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket Nos. 357511, 358134); slip op at 6, lv pending, this Court explained:

> Critically, as discussed, our Supreme Court has explained that a wrongful-death action used to be construed as providing a new cause of action for the benefit of the beneficiaries. *Wesche*, 480 Mich at 90. The obsolete understanding of the nature of a wrongful-death action would be consistent with the *Baker* Court's analysis and holding. However, although not expressly cited in *Wesche*, our Supreme Court has necessarily—if implicitly—overruled the fundamental principle underlying the analysis and holding in *Baker*. We recognize that we are "bound to follow decisions by [our Supreme] Court except where those decisions have clearly been overruled or superseded," and we may not anticipate that a decision from our Supreme Court will be overturned. *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016) (emphasis in original). Although "it is not always so easy to determine whether a case has been 'clearly overruled or superseded' by intervening changes in the positive law," such a conclusion may be easily drawn where "the Legislature has entirely repealed or amended a statute to expressly repudiate a court decision." *Id*. at 191 n 32. The statutory amendment at issue here is less extreme. Nevertheless, the wrongful-death act, as amended by 1931 PA 297, lacked the "including" language in the current statute. Thus, when it was considered by the *Baker* court, the wrongful-death act was not only understood to provide a fundamentally different kind of cause of action, the statute lacked the open-ended inclusiveness of the current statute. Either way, *Baker* has clearly been overruled or superseded, and it was no longer "good law" long before this Court decided *Denney*.

See also *Daher v Prime Healthcare Services-Garden City*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 358209); slip op at 4, lv pending (providing the same explanation quoted above).

Accordingly, in *Zehel* and *Daher*, this Court reaffirmed that "damages for lost earnings are allowed under the wrongful-death statute" and that "plaintiffs may recover damages for [a decedent's] lost future earnings to the same extent [the decedent] could have recovered those damages had he survived." *Zehel*, ___ Mich App at ___; slip op at 5-6 (quotation marks and citation omitted); *Daher*, ___ Mich App at ___; slip op at 3-4 (quotation marks and citation omitted). *Zehel* and *Daher* are binding under MCR 7.215(J)(1) because they decided the same question at issue here, namely, whether a decedent's estate may recover damages for the decedent's lost wages in a wrongful-death action predicated on medical malpractice. Therefore, the trial court correctly concluded that lost future earnings are recoverable in the wrongful-death act.

Defendants further argue, however, that even if lost future earnings are recoverable, plaintiff cannot recover them in this case because the decedent was an infant whose lost future earnings are too inherently speculative to be awarded. "Recovery of damages is not precluded 'for lack of precise proof,' nor must a plaintiff provide 'mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable, particularly in circumstances in which the defendant's actions created the uncertainty.' " *Daher*, ___ Mich App at ___; slip op at 4, quoting *Hannay*, 497 Mich at 79; see also *Zehel*, ___ Mich App at ___; slip op at 7. However, "[t]he general rule is that remote, contingent, and speculative damages cannot be recovered in Michigan in a tort action." *Daher*, ___ Mich App at ___; slip op at 4, quoting *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005); see also *Zehel*, ___ Mich App at ___; slip op at 7.

In *Daher*, this Court distinguished between " 'work-loss damages' and 'loss of earning capacity damages,' the former being for income a person *would have* earned, and the latter being for income a person *could have* earned." *Daher*, ___ Mich App at ___; slip op at 5, citing *Hannay*, 497 Mich at 80-82. "By necessary implication, loss of earning capacity permits much greater latitude. . . . Nevertheless, the calculation must be reasonably based on some evidence." *Daher*, ___ Mich App at ___; slip op at 5. In regard to a child's loss of earning capacity, this Court held that "a child's expected future earning potential is not *inherently* too speculative to permit recovery," but that a child's future earning potential must "be proven with reasonable certainty based on the child's unique and known traits and abilities." *Id.* at ___; slip op at 7. This Court stated that it was not necessary that the child have an actual employment history, and it declined to specify at what age a child's earning potential can be determined with reasonable certainty because "different people mature at different rates, so that inquiry will inevitably depend on the specific child at issue." *Id.* This Court stated:

> Nevertheless, it is well-known that at least by the end of middle school, it is common for teachers or other adults in a child's life to perceive when a child shows promise in a field, has any particular aspirations or strengths, displays developed personality characteristics such as conscientiousness or the kind of social adeptness that would likely evolve into adult networking skills, and so on. Furthermore, it is also well-known that a child's environment, including the child's parents, school system, general area of residence, participation in extracurricular activities, exposure to traumas or role models, and similar extrinsic influences will affect the child's future earning potential. [*Id.*]

In *Daher*, the decedent was a 13-year-old child and this Court "unequivocally reject[ed] the proposition that the future earning potential of a 13-year-old categorically cannot be proven with reasonable certainty." *Id*. This Court concluded that the future earning potential of the 13-year-old decedent could be "proven with reasonable certainty based on personal characteristics and influences known at the time." *Id*.

Conversely, the child at issue in *Zehel* was an infant who was born prematurely, died hours after birth, and "never had an opportunity to demonstrate any personal characteristics that would permit extrapolation." *Zehel*, ___ Mich App at ___; slip op at 13. This Court echoed its statement in *Daher* that "a child's expected future earning potential is not *inherently* too speculative to permit recovery," but also stated that "the record must permit some reasonable basis for personalizing an estimation specific to that particular child." *Id.* at ___; slip op at 9. This Court concluded that there was "simply no way to know anything" about the newborn decedent's "interests, aspirations, personality, strengths and weaknesses, academic performance, or any other characteristic that could be extrapolated." *Id*. The child "never had the chance to display any individual personality whatsoever," and it was "too speculative to extrapolate from her parents or sibling." *Id*. Therefore, this Court held that the defendants were "entitled to summary disposition in their favor with respect to plaintiff's claims for lost future earning potential." *Id*.

This case is factually similar to *Zehel*. Like *Zehel*, this case involves a 17-day-old decedent who died in infancy. The child never had an opportunity to develop any traits or characteristics that could be extrapolated to project the child's future earning potential with reasonable certainty. Therefore, the trial court erred by denying defendants' motion for summary disposition with respect to future wage loss damages.

B. RECOVERY OF DAMAGES FOR LOST HOUSEHOLD SERVICES

Defendants also argue that the wrongful-death act does not provide for recovery of loss of future household services of the decedent.

As noted, MCL 600.2922(6) allows the trial court or jury to award damages, including "damages for the loss of financial support and the loss of the society and companionship of the deceased." In *Thorn*, 281 Mich App 644, the plaintiff's wrongful-death medical malpractice action sought damages for the economic value of household services the decedent provided to her minor children. The defendants argued that these damages were not recoverable because MCL 600.2922(6) did not include loss of services as a recoverable element of damages. *Id*. at 648. This Court rejected this restrictive reading of the statute, stating:

> When viewed in context, rather than as a solitary term, the word "including" indicates an intent by the Legislature to permit the award of any type of damages, economic and noneconomic, deemed justified by the facts of the particular case. As such, the term "including" should be construed as merely providing specific examples of the types of damages available, and not an exhaustive list. To view the term in the limiting manner urged by defendants would result in an internal contradiction. Interpreted in the manner suggested by defendants, the statutory language would mandate both the award of damages "consider[ed] fair and equitable, under all the circumstances" while simultaneously limiting a plaintiff's

> recovery only to those items specified in the list following the term "including." We find that such an interpretation conflicts with our rules of statutory interpretation that preclude construing terms beyond their "plain and ordinary meaning" and would render the expansive language preceding use of the term either "surplusage" or "nugatory." [*Id.* at 651, quoting *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 648-649; 732 NW2d 116 (2007).]

This Court further remarked that "[t]he cost of replacement services is a well-recognized component of damages that is recoverable by a person injured because of medical malpractice. Consequently, because the claim survives a decedent's death, a claim for loss of services must also be available in an action for wrongful death." *Thorn*, 281 Mich App at 660-661.

Defendants attempt to distinguish the present case from *Thorn* by emphasizing that the damages in *Thorn* compensated the decedent's children for loss of services their parent was already providing. They argue that the holding in *Thorn* should not be extended to a parent's loss of household services that a child decedent may have provided in the future. But regardless whether such damages are recoverable under MCL 600.2922(6), they must still be proven with reasonable certainty. *Daher*, ___ Mich App at ___; slip op at 4. This Court's conclusion in *Zehel* that an infant decedent's future earnings are unavoidably speculative applies here as well. There is simply no evidence from which a trier of fact could infer what services the decedent would have been able to perform or how much of his time would have been devoted to services. Smolarski's calculation assumed that the decedent would begin to provide services at age 16 and continue to provide services until he was 67 years old. This assumption is highly speculative because an adult's availability and inclination to provide services to parents is unpredictable. A variety of circumstances could infringe upon the adult child's ability to help parents. An adult child might seek education and employment in a different city, serve in the military, and assume responsibilities for his own job and children. The value of the infant decedent's household services is no less speculative than the value of his future earnings. Therefore, the trial court erred by denying summary disposition in favor of defendants with respect to damages for lost household services.

C. DEFENDANTS' MOTION IN LIMINE

Defendants also argue that the trial court erred by denying their motion in limine to preclude Smolarski's proposed testimony on the ground that it was inherently unreliable. Because the challenged testimony relates only to plaintiff's requested damages for lost future earnings and lost household services, and because we have concluded that defendants are entitled to summary disposition regarding plaintiff's claims for such damages, it is unnecessary to address this issue.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michelle M. Rick
/s/ Douglas B. Shapiro
/s/ Anica Letica